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IN THE

Supreme Court of the United States

.....Term

No. 743

UNITED STATES OF AMERICA, ex rel, MIKE SPINELLA,
Petitioner,

versus

JOSEPH SAVORETTI, District Director of United States Immigration and Naturalization Service, District No. 6, Miami, Florida.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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DAVID W. WALTERS,
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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, MIKE SPINELLA, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered on January 29, 1953 dismissing as moot petitioner's appeal from the decree entered in the United States

District Court for the Southern District of Florida, Miami Division. That decree dismissed petitioner's petition for a writ of habeas corpus brought against JOSEPH SAVORETTI, District Director of United States Immigration and Naturalization Service at Miami, Florida, as respondent.

I

JURISDICTION

The jurisdiction of this Honorable Court is invoked under Title 28 U. S. C. 1254 (1). The judgment below was rendered in the United States District Court on April 10, 1952 and appeal therefrom was dismissed on January 29, 1953 by the United States Court of Appeals, Fifth Circuit.

II

SUMMARY

On April 2, 1952 petitioner was arrested by the respondent under a warrant of arrest which charged that petitioner had on February 1, 1952, entered the United States illegally by violating Act of 1924, entering without suitable and proper immigration visa, and by violating Act of 1917, having entered without inspection by false and misleading statements concerning United States citizenship; and thereupon petitioner was detained and held in custody without bond and the respondent refused to release him under bail. On April 4, 1952, the petitioner filed, in the United States District Court at Miami, Florida, his petition for a writ of habeas corpus, alleging that respondent had acted arbitrarily, capriciously and unreasonably and had abused his administrative discretion in refusing to release petitioner from custody under suitable bond (Rec. 1). After hearing, the United States District Court, on April 10, 1952, dismissed the petition for writ of habeas corpus; and on April 15, 1952, petitioner appealed from said order of the District Court to the United States Court of Appeals for the Fifth Circuit (Rec. 9).

Because the Fifth Circuit Court of Appeals adjourned for the summer before and without considering petitioner's appeal, because both the District Court and the Court of Appeals had denied petitioner's motion for release on temporary bail and because petitioner was still being held in detention in the Dade County Jail at Miami, Florida, and was without other remedy, petitioner presented another writ of habeas corpus directly to the Honorable Hugo L. Black, Justice of the Supreme Court of the United States, upon which petition the Honorable Justice Black, on June 25, 1952, ordered the petitioner released from respondent's custody under bond in the amount of $10,000, said order providing as follows:

> "IT IS ORDERED that the applicant, MICHAEL SPINELLA, be released from the custody of JOSEPH P. SAVORETTI, District Director, Immigration and Naturalization Service, Miami, Florida, upon furnishing of a bond in the amount of ten thousand dollars ($10,000.00), the form of the bond and surety thereon to be approved by the Clerk of the United States District Court for the Southern District of Florida, or a Judge of said court, and when approved to be filed with the said Clerk.
>
> "This order is to continue throughout the applicant's appeal now pending before the United States Court of Appeals for the Fifth Circuit *and* pending possible review of the decision of that court by petition for writ of certiorari to the Supreme Court of the United States, *unless prior thereto there has been a final* administrative and *judicial determination of deportability.* In the event a petition for writ of certiorari is filed and granted, then this order is to continue in effect until the mandate of this Court issues." (Rec. 58)
>
> (Italics ours)

On June 26, 1952, petitioner posted suitable bond, pursuant to the foregoing order, and since then he has been, and still is at liberty thereunder, having at all times complied with each and every the terms and conditions thereof.

On December 15, 1952, the respondent presented to the United States Court of Appeals its motion to dismiss the appeal on the ground that the question of custody had become moot in that the Board of Immigration Appeals had, on November 7, 1952, entered its final order of deportation. (Rec. 55) In response to said motion, petitioner urged that the question of his custody was not moot for the reason that the petitioner had not exhausted all the administrative *and judicial remedies* available to him and that the order of the Honorable Justice Black, above set forth, contemplated petitioner's liberty under bail during the pendency of *all* administrative and *judicial review of the deportation order* and pending appeal from the order denying petitioner bail (Rec. 56-59). On January 29, 1953, the United States Court of Appeals granted respondent's motion to dismiss (Rec. 61) and thereafter on March 12, 1953, denied the petitioner's petition for rehearing (Rec. 63). As a consequence, the question of respondent's restraint of petitioner's liberty and holding him without bond pending a final adjudication of petitioner's deportability has not been determined, but requires determination on its merit.

MICHAEL (MIKE) SPINELLA is a fifty-eight-year-old native of Italy who has lived in the United States continuously since his parents brought him to this country for permanent residence in 1899 when he was but four years old. He is the father of four United States citizen children, two of whom are still entirely dependent upon him for support. He contributes substantially to the support of other members of his family. He is a well-established business man and hotel owner. Petitioner believed that he was a United States citizen until 1950 when he applied for a United States passport for the purpose of making a trip to Rome to celebrate the Catholic Holy Year. He first learned that he was not a citizen of this country when he was denied the passport he applied for, on the ground of alienage. Thereupon he applied for and obtained a re-entry permit, which he used upon returning to the United States from his visit in Italy as a permanent resident alien.

On the basis of the hearing granted petitioner before the immigration (administrative) authorities, he was found subject to deportation and on November 7, 1952, the immigration authorities entered their final *administrative* order directing that petitioner be deported. No criminal charge was made against petitioner during the hearing before the immigration authorities; the record of that deportation hearing shows that petitioner has never engaged in or been charged with subversive activities of any kind and that he has never been convicted of a crime that involved moral turpitude. The convictions made of record during the deportation proceedings before the immigration authorities were mainly for petty offenses resulting from petitioner's domestic difficulties and these convictions were prior to 1924.

Your petitioner has, at all times since the date of his arrest by respondent, been ready, willing and able to post suitable bond for release from custody; yet the respondent detained him without bond from April 1, 1952, the date of his arrest, and unreasonably and arbitrarily refused to grant him bail, and still persists in such abuse of the discretionary right vested in him, the petitioner being at liberty now under the order of the Honorable Justice Black, above set forth. Respondent contends that he is justified in detaining petitioner without bond for the following reasons: (Rec. 8)

> "That pursuant to the authority contained in Section 156(a) of Title 8, United States Code, the respondent has refused to release the petitioner under bond or on conditional parole for the following reasons:
>
> "(a) That the petitioner is clearly deportable under the laws of the United States;
>
> (b) That the deportation proceeding pending against the petitioner will be expeditiously concluded;
>
> (c) That the respondent is not satisfied that if the petitioner is enlarged under bond he will

appear for deportation if deportation is ordered;

(d) That upon the basis of information and evidence received by the respondent concerning petitioner's criminal activities over an extensive period of time, respondent believes that petitioner, if released under bond, will violate the laws of the several States and the United States."

The contentions of the respondent, it is respectfully submitted, are not supported by the record in this cause; petitioner, since his release under bond on Justice Black's order, on the 26th day of June, 1952, has pursued a law-abiding life in his community and has respected and complied with all the terms and conditions of the bond and order under which he was placed at liberty on that date. Respondent's denial of liberty under bond to your petitioner is an arbitrary, unreasonable and capricious abuse of the discretion vested in him.

IV

QUESTIONS PRESENTED

This petition presents to this Honorable Court the following questions.

1. Is the petitioner entitled to his liberty under suitable bond pending final judicial review and determination of his deportability?

2. Did the United States Court of Appeals for the Fifth Circuit err in deciding that the issue of petitioner's liberty became moot upon the sole entry of a final order of deportation against petitioner *by the* immigration *(administrative) authorities* and *before judicial review and adjudication?*

3. Did the United States Court of Appeals for the Fifth Circuit err in holding that the issue on appeal before it had become moot, refusing to consider the petitioner's appeal on its merit and dismissing it without hearing?

V

REASONS WHY WRIT OF CERTIORARI SHOULD BE GRANTED HEREIN

It is respectfully submitted that this Honorable Court should grant its writ of certiorari to this petitioner for the following reasons:

(a) That the question of whether respondent has the right to hold petitioner in custody, without bond, or whether petitioner is entitled to his liberty under suitable bond, will continue to be at issue until (1) the question of petitioner's deportability has been adjudicated by the highest court of judicial review, (2) the deportation proceedings against petitioner are otherwise terminated, (3) the petitioner has departed from the United States, or (4) the petitioner has been deported from the United States.

(b) That so long as petitioner is in peril of detention by the respondent, the issue of his custody or liberty cannot be declared moot.

A final *administrative* order of deportation by no means exhausts the remedies available to petitioner for judicial review and adjudication, during which respondent could and would detain the petitioner and hold him without bond.

In finding the issue of petitioner's detention moot, the United States Court of Appeals relied upon *Eisler* v. *District Director of Immigration*, 162 F.(2) 408. It is respectfully submitted that the *Eisler* case does not support the position taken by respondent in the instant case. In the *Eisler* case the alien had voluntarily departed from the United States during the pendency of his appeal, thereby terminating the proceedings and causing the issues presented there to become moot. The dismissal of the appeal of this petitioner, in the case at bar, has no foundation in the *Eisler* case and

serves only to circumvent a decision on the merit of petitioner's appeal.

The questions presented to the Court of Appeals in this cause are of grave importance and involve serious constitutional questions of petitioner's rights under the Fifth and Eighth Amendments to the Constitution of the United States, and, also, requires an interpretation of federal statutes respecting the discretionary power vested in the Attorney General of the United States relating to the detention and restraint of the liberty of aliens who are not charged with subversive, immoral or criminal activities in deportation proceedings.

Petitioner earnestly urges that the question at issue in his appeal to the United States Court of Appeals for the Fifth Circuit has not become moot and requires determination on its merit.

WHEREFORE, your petitioner PRAYS that this Honorable Court will grant its writ of certiorari in this cause.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 743

UNITED STATES OF AMERICA, EX REL.
MIKE SPINELLA, *Petitioner*

v.

JOSEPH SAVORETTI, DISTRICT DIRECTOR OF UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, DISTRICT NO. 6, MIAMI, FLORIDA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (R. 59-60) is reported at 201 F. 2d 364.

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1953 (R. 60). A petition for rehearing was denied on March 2, 1953 (R. 64). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a petition for habeas corpus filed by an alien to challenge his detention without bond after his arrest on a warrant of deportation, and before a final determination of deportability, is rendered moot by the entry of a final order of deportation.

2. Whether an order of a Justice of this Court granting petitioner bail pending review of the District Court's order denying the alien's petition for habeas corpus, has any effect on the foregoing question of mootness.

STATUTES INVOLVED

Section 23 of the Internal Security Act of 1950, 64 Stat. 987, 1011, 8 U.S.C. (Supp. V) 156(a), in effect at the time that petitioner filed his habeas corpus petition in the District Court, provided, in relevant part, as follows:

> * * * Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond * * *; or (3) be released on conditional parole. It shall be among the conditions of any such bond, or of the terms of release on parole, that the alien shall be produced, or will produce him-

> self, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody and any other charges which subsequently are lodged against him, and for deportation if an order for his deportation has been made. When such an order of deportation has been made against any alien, the Attorney General shall have a period of six months from the date of such order within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on conditional parole, or upon bond in an amount and specifying such conditions for surrender * * * as may be determined by the Attorney General.
>
> * * *

This section was repealed on June 27, 1952, 66 Stat. 279, effective December 24, 1952. Section 242 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 208, effective that same day, which substitutes for the statute quoted above, provides, in relevant part, as follows:

> (a) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such

alien * * * may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond * * *; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

* * *

(c) When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court,

within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond * * *, or released on such other conditions as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period.

STATEMENT

On April 4, 1952, the petitioner, an alien who had spent most of his life in the United States, filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida (R. 1). He alleged that on April 2, 1952, he was arrested and charged with illegal entry into the United States on February 1, 1952, in that he had falsely represented himself, at the time of such entry, to be a citizen of the United States, and had not been in the possession

of proper travel documents (R. 2). He alleged, further, that since his arrest he had been denied bail by the respondent and his subordinates, pending a determination whether he was deportable (R. 2). Representing himself to be ready and able to give bond "to guarantee his appearance in said deportation proceedings," petitioner prayed issuance of a writ of habeas corpus (R. 3-4).

In his return, the respondent stated that petitioner was being held pursuant to the then effective 8 U.S.C. 156(a), *supra*, pp. 2–3, and that he had not been released for the following reasons (R. 8):

> (a) That the petitioner is clearly deportable under the laws of the United States;
>
> (b) That the deportation proceeding pending against petitioner will be expeditiously concluded;
>
> (c) That the respondent is not satisfied that if the petitioner is enlarged under bond he would appear for deportation if deportation is ordered;
>
> (d) That upon the basis of information and evidence received by the respondent concerning petitioner's criminal activities over an extensive period of time, respondent believes that petitioner, if released under bond, will violate the laws of the several States and the United States.

After a hearing at which testimony was taken, the trial court concluded that the denial of bail was not an abuse of discretion, in view of all the circumstances (R. 53).

On appeal, the Court of Appeals sustained a motion of the respondent to dismiss the case as moot, based on the fact that, on November 29, 1952, after the entry of the District Court order, the final order of deportation against petitioner had been entered (R. 59-60). After the denial by the Court of Appeals of a petition for rehearing (R. 64), the present petition to review the order dismissing the case was filed.[1]

ARGUMENT

1. The case which petitioner began can no longer be adjudicated. It is moot. The question whether petitioner was entitled to bail pending a final determination of deportability is rendered meaningless by the fact that there has since been a final determination of deportability.

The issue whether, after a determination of deportability, there should be bail, may depend on some of the same considerations as the issue whether there should have been bail before that determination. Nonetheless, the burden on the alien after such determination must be greater,

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[1] The facts concerning a bail order granted petitioner by Mr. Justice Black during the pendency of this appeal are set out in connection with our argument on that point, *infra*, pp. 8-9.

since he has already had the opportunity for full hearing and review to establish that he is not subject to deportation. Whereas dangerous proclivities in a pre-final-determination must always be set against the possibility that the alien may be found not to be deportable, this is not so when the alien is in the position of the present petitioner. The sharp distinction in the statute between bail, "pending final determination" and bail after such determination, see pp. 2–3, *supra,* supports this view by specifically requiring separate exercises of discretion by the Attorney General before and after the order of deportation.[2] See also Rule 46(a) of the Federal Rules of Criminal Procedure which makes plain the difference between the bail standards before and after conviction.

2. Petitioner seems to think that an order of Mr. Justice Black granting him bail pending review of his petition for habeas corpus, or until a final determination of his deportability, somehow prevents the present case from being moot. Indeed, this argument seems to be the only basis for the contention that the case is not moot. We think it is plainly unsound.

After the District Court's denial of his habeas corpus petition, seeking release on bail pending

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[2] The statute applicable at the time this proceeding began has been repealed. The new statute makes the division between the periods before and after a final determination of deportability even sharper. See pp. 3-5, *supra.*

determination of deportability, petitioner took an appeal to the Court of Appeals for the Fifth Circuit. As it appeared that the case might not be reached before the end of the court's 1951-1952 term, petitioner asked for an advancement of hearing, or, in the alternative, for bail pending disposition of the appeal. The motion was denied. Petitioner thereupon, on June 25, 1952, obtained an order from Mr. Justice Black granting bail, the presently relevant portion of which reads as follows (R. 58):

> This order is to continue throughout the applicant's appeal (from the order of the United States District Court denying appellant's petition for a writ of habeas corpus and release under bond) now pending before the United States Court of Appeals for the Fifth Circuit and pending possible review of that court by petition for writ of certiorari to the Supreme Court of the United States, unless prior thereto there has been a final administrative and judicial determination of deportability. In the event a petition for writ of certiorari is filed and granted, then this order is to continue in effect until the mandate of this Court issues.

Petitioner, ignoring the words "unless prior thereto," argues that Mr. Justice Black's order "contemplated petitioner's liberty under bail dur-

ing the pendency of *all* administrative and *judicial review of the deportation order* and pending appeal from the order denying petitioner bail" (Pet. 4) and that therefore, "the question of respondent's restraint of petitioner's liberty and holding him without bond pending a final adjudication of petitioner's deportability has not been determined, but requires determination on its merit" (Pet. 4).

But that is clearly not the purport of Justice Black's order. The order related to the cause before the Justice, i.e. the petition for habeas corpus to secure administrative bail pending determination of deportability. By the explicit terms of Justice Black's bail order, it will cease if the petition for certiorari in that cause is disposed of adversely to petitioner. However, the order also provides for termination of the bail bond even before the decision on certiorari in one contingency, i.e. if prior to such determination there has been a final administrative and judicial determination of deportability. In other words, the bail order was not to prevent the government from deporting petitioner if it was in a position to do so before the cause to which Justice Black's order related had reached completion.

Since there has not been a final judicial determination of deportability, the contingency contemplated by the order has not occurred, and the bail order is therefore still effective until this

Court acts on the petition for certiorari in this cause. But manifestly, the order does not affect petitioner's right to bail in some other cause which he may or may not bring. And certainly Justice Black did not intend, by his bail order, to affect the substance of the cause and to prevent a court from saying that the cause before it has become moot, if in fact it has. The particular cause to which Justice Black's order relates, the right to administrative bail *pending* final determination of deportability, has become moot. Whether there is a right to administrative bail *after* final determination of deportability pending judicial review is another question entirely, which must be determined in a new proceeding and which is unaffected by Justice Black's bail order in this proceeding.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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